No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLEE.

BERT SCHLESINGER,
LEON E. PRESCOTT,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO.

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American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven,

Appellants,

vs.

David Isaacs,

Appellee.

BRIEF FOR APPELLEE.

We very much regret that in the discussion of this case counsel for the appellants has seen fit to indulge in offensive personalities concerning some of his own witnesses, the appellee and the distinguished judge who presided at the trial of this cause. We shall consume but little time in replying to insinuations which we regard as beneath the dignity of a reply. Counsel seeks to secure a reversal of the decree, not through legitimate argument of the facts and law, but by creating

a prejudice through immaterial innuendos which might more properly be addressed to a cheap vaudeville audience. We find interspersed in the brief such statements as this:

> "Karl Shermer, Abe Kessler, Morris Buttnick, Isadore Colsky and Sam Cone, gentlemen whose very names smack of honesty and good intention, 'friends of Mr. Isaacs,'—a picturesque band under whose black flag the defendant himself tells us he shipped when he ran up the Jolly Roger and bore down on this gold laden merchandise galleon of the complainants."

(The record does not show that the testimony of these witnesses was before the court. Present counsel was not engaged until the trial of the cause, and he understands that these men testified by deposition, but on account of the failure to take the depositions in accordance with the rules of court, they were suppressed.)

There is nothing in the record to justify the aspersions sought to be cast upon the men bearing these names. It is no compliment to the intelligence of this court that counsel descends to this method of argument. His obvious purpose is to lodge a prejudice in a place dedicated to law and justice. Such appeals are not infrequently made by the blatant demagogue to the unthinking mob.

We find his own witnesses who testified against his contentions in this grotesque and highly imaginative case similarly abused, and then we find references such as these with respect to the distinguished judge who decided the cause:

"The court's unquestioning acceptance and reception in evidence of this letter-proof report which was a most glaringly imaginative composition as bearing upon the accuracy of defendant's figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence." * * *

"It is a smiling commentary upon the utter inconsistency of the opinion and decision in the court below that the learned judge of the trial court failed utterly to grasp the significance of this exhibit." * * *

"We say, with all due respect to the honored justice from Spokane who presided at the trial, that evidently the District Court, not to be outdone by this *largesse* on Herrick's part, confirms him in it by accepting and receiving in evidence a 'report' of no 'relatively large' importance, being, as Herrick himself admits, an opinion not based on facts but depending in the last analysis on self-serving explanations 'by Mr. D. Isaacs' *de hors* the record and made ex parte weeks before the trial."

" * * * and its reception in evidence and adoption by the District Court as a whitewash of this trustee, was absurd and gross error and a repudiation of all the fundamental principles of evidence."

With these preliminary remarks, for which we apologize to the court, we shall now proceed to a discussion of the case on the merits, in an endeavor to point out that the decree of Judge Rudkin is absolutely just and in complete harmony with the facts of the case.

ISSUES RAISED BY THE PLEADINGS.

Statement of Facts: Owing to the many changes of theories advanced by counsel in the lower court and in his brief, it is quite difficult to understand precisely what he claims. On behalf of the complainants he filed and verified personally several bills of complaint.

The first amended bill of complaint alleges that on the *11th day of August, 1913,* plaintiffs were insurers in various proportional amounts, of the stock of merchandise of A. Bridge & Company, in the City of Seattle, State of Washington; that on or about that date a fire occurred in said store, causing a loss to merchandise; that the assignee for said Bridge and plaintiffs could not agree upon the amount of damage; that the stock was inventoried at the sum of $48,000, and after negotiations between plaintiffs and the assignee of the assured, the sound value of the stock *remaining after the fire was fixed at $34,300;* that the plaintiffs purchased the entire stock of the assignee of Bridge for that amount; that defendant contracted with plaintiffs to dispose of the stock of merchandise; that he advanced a guarantee of $18,100 in cash; that he took over the stock in its entirety and agreed to sell and dispose of the same to the best possible advantage, and to return all moneys received by him from such sale over and above his guarantee and actual expenses; that as such trustee he sold all of plaintiffs' stock, but that he *did not return to them the moneys taken in by him on such sale over and*

above his guarantee and actual expenses, but retained large sums which plaintiffs are unable to state; that on November 26, 1913, defendant rendered a statement (see statement in paragraph III of plaintiffs' bill); that "the said net proceeds *were paid over to your complainants* who at the time believed and had no other knowledge nor had any information of any kind to put them on inquiry to question the said statement or good faith of the defendant;" that "your complainants are informed and believe that said statement did not constitute a full accounting by said defendant, and that the *expense items in said statement are excessive,* and likewise the *totals are false and untrue,"* and complainants ask discovery of the "entire true expenditures and receipts of said sale;" that since the rendition of the statement a suit was begun in this court against the defendant, entitled "Seynei vs. Isaacs," to establish a partnership; that hearings were had over a period of a year and a half, and brought to a conclusion on the 9th of February, 1916; that upon such hearings evidence was given under oath by defendant's partner, "who managed the entire sale in Seattle conducted by the defendant for complainants' account," that sums in cash were received by said defendant upon the said sale for the account of the insurance companies largely in excess of the sum of $28,901.92, which defendant claimed in his above statement to be the total of receipts; that this knowledge of the fact has only *come of recent date* and was not made known to complainants before *"ten days prior to filing of this*

bill of complaint;" that plaintiffs reside in other states and had no personal knowledge of the facts; that they believed the representations of said trustee to be true; that complainants were in ignorance of their falsity, accepted as true "said misrepresentations and the facts therein contained;" that thereafter the fact of the falsity of said statement has been sedulously concealed by said defendant to the present time. This bill was filed on the 4th day of May, 1916.

ANSWER TO FIRST AMENDED BILL.

An answer to this first amended bill was filed on June 15, 1916. The answer sets out that the sound value of the stock was inventoried by Bridge at $45,954, and that the sound value of the stock before the fire was fixed at $34,300; it avers that at the time of the rendition of the statement, complainants had full knowledge of all the matters and things alleged in the statement; denies that the statement did not constitute full accounting; denies that the expense items were excessive; denies that at any hearings any evidence was given under oath by the defendant's partner that sums in cash were received by defendant upon the said sale to the account of complainants in excess of the sum of $28,901.92, and that if any such evidence was given it was false; denies any fraudulent concealment of any facts by defendant; denies that the sale of the Bridge stock

was for a sum greater than $28,901.92, the amount mentioned in the statement; denies that defendant ever refused to account, or that complainants requested any accounting; admits that defendant had in his possession the Bridge stock of merchandise; admits that complainants paid the assignee $34,300 in cash, of which defendant contributed $18,100; denies that complainants were compelled to employ counsel, but alleges that the attorney for complainants sought out complainants, informing them that he had been successful in obtaining a judgment against defendant in the action of *Seynei v. Isaacs* and that if they would permit him to act as their attorney in an action to be brought against defendant for an accounting, said Olney "would accept said employment on a contingent fee"; that with said understandings complainants employed said Olney as their attorney in the above entitled matter.

Then follows affirmative defenses, among which it is alleged (page 8 of answer) that payment by defendant of $18,100 was made upon the understanding that complainants employed defendant to sell the remaining stock of merchandise, for which services complainants were to pay him twenty per cent of all sums realized on account of the sale, as also all expenses and costs of maintenance, incident to, and in the sale of said merchandise; that on the 26th of November, 1913, defendant rendered to complainants a full, true and complete statement of all sums received by him under his employment; that

complainants accepted the money in full settlement of all matters and with full and complete knowledge thereof; that complainants are guilty of *laches and unreasonable delay* in the institution of the action, and that they had full information of all matters and things contained in the statement from the time of the rendition thereof.

AMENDMENT TO BILL FILED DURING TRIAL.

During the trial of the case while testimony was being introduced, an amendment was filed to the first amended bill, which amendment avers that the defendant sold in bulk secretly to himself, the balance of the stock remaining after the three weeks of sale; that knowledge was not communicated to the complainants, and that they only became aware of the same within ten days prior to the commencement of this action; that he sold secretly to himself between one-half and two-thirds of the entire merchandise, and the alleged sale was accomplished by only one day's notice, which was grossly inadequate; that he thus transferred to himself their said trust fund without bona fide competitive bids of any kind or nature; that he clandestinely credited to himself in his final statement a sum amounting to twenty per cent of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. This amendment was likewise verified by Mr. Olney.

During the trial an answer was filed to this amendment, which sets up that an account was rendered at the time the bulk sale was made; that the bulk sale was made with plaintiffs' knowledge and consent; that plaintiffs had full knowledge of the fact at least three years prior to the filing of the amendment and made no objection thereto; it denies that knowledge was not communicated to plaintiffs at any time by defendant, and avers that the matter of the sale was discussed with plaintiffs and their agents prior to the making thereof; it further avers that plaintiffs made no objection to the sale until the 31st day of January, 1917, the date upon which the amendment was first filed; it denies that notice of sale was insufficient; it avers that there were competitive bids of bona fide bidders, and that defendant's bid was the highest bid therefor; that the lowest bid was in the neighborhood of $4000; that for more than three years plaintiffs had full knowledge of the bidding and the manner of obtaining bids and made no objection thereto, but on the contrary received the amount of defendant's bid on the 28th of November, 1913, and retained his money; that he openly credited himself in his final statement with the amount of his commissions; that he openly claimed to be entitled thereto; that his claim therefor was known to plaintiffs and was allowed by them; that plaintiffs made no objection thereto of any kind until the 31st of January, 1917, although they had full knowledge for more than three years prior to that time.

(Then follows an averment that no acts of diligence on the part of plaintiffs were shown; that it appears upon the face of the complaint that they were and are guilty of laches and there is no averment excusing delays on the part of plaintiffs or showing concealment of any facts from plaintiffs, and there is no averment showing that by the exercise of ordinary diligence the discovery might not have been sooner made; that the alleged cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.)

With the pleadings in this situation, the trial proceeded.

Before discussing the questions of law involved and authorities applicable to the facts, we will briefly advert to the facts of the case.

Statement of Facts.

The defendant, Mr. Isaacs, had been engaged in the business of handling salvage merchandise for the insurance companies for upwards of fifteen years, and on the 15th day of August, 1913, he received a telegram from George C. Main, agent of complainants, calling him to Seattle. On his arrival Mr. Main presented him with an inventory of the Bridge stock and asked him to examine it

and report to him. Isaacs reported that the stock was subject to considerable depreciation, that it was old and the inventory filed by Bridge inflated; *that the value of the goods before the fire was in the neighborhood of $34,000*, and that in his judgment the fire loss was $16,000. Main requested him to make him a proposition. Isaacs stated that if Bridge's assignee (Bridge being then insolvent) would not accept that figure, Main should get the sound value of the merchandise down where it belonged, namely, $34,300, and an agreement permitting the use of the premises to run a sale. Main thereupon came in contact with Bridge's adjuster, who placed a value of some $38,000 on the stock. Finally by way of compromise Bridge's adjuster agreed in placing the sound value at $34,300, and thereupon Mr. Main, acting for the insurance companies, gave Bridge's assignee $34,300 and became in that way the owners of the stock of damaged goods, and were relieved from their insurance liability to Bridge's assignee. Before paying out this money, however, Mr. Main, on behalf of the companies, entered into this arrangement with Isaacs: Isaacs was to advance $18,100 of the $34,300 to be paid to Bridge's assignee, and Isaacs did give Mr. Main his check for $18,100, and it was agreed that he should conduct a retail fire sale for the benefit of the insurance companies out of which he was to be paid a commission of 20% and expenses of sale of the stock. This was no new venture for Mr. Isaacs, as he had been engaged in similar busi-

ness transactions with insurance companies for upwards of fifteen years.

It will be borne in mind that the insurance companies were to take over the Bridge stock on the payment of $34,300, their investment therein was to be $16,200, and Mr. Isaacs was to advance the balance, $18,100. Originally the complainants were willing through Mr. Main to allow the insured on account of damage between $13,000 and $14,000. In other words, the companies conceded that they were liable for this latter sum. Whether they purchased the stock or not they were compelled to pay at least $14.000 to get rid of their liability on their insurance policies; their purchase by paying $16,200 toward the $34,300 purchase relieved them of all liability on the policies.

The court will therefore at once see—"that the gold laden merchandise galleon of the complainants"—represented an investment to the complainants over and above their admitted liability of the precise sum of $2200, this being the difference between $14,000, which they were willing to pay on their policies and $16,200 which they contributed toward the purchase price of the goods under the Main-Isaacs' purchase.

Mr. Isaacs took possession of the stock on the 7th day of September, 1913, but the business was conducted under the name of H. C. Seynei. He had been manager and buyer for Mr. Bridge for eleven years preceding the fire, and was acquainted

with the stock as well as with the customers, and by conducting the business under the name of H. C. Seynei it was thought trade might be attracted. It was not the intention of either the insurance companies or Isaacs to prolong the sale or to run a retail merchandise store, but to conduct rather a hurry-up sale. There was no permanent selling organization and no cashiers and no bookkeepers. Isaacs was eager to keep down his expenses and he economized in every possible way. He was only interested in three things, namely, to receive his return of $18,100, his 20% commission and expenses incurred and to return a profit, if possible, to the complainants. Mr. Isaacs took possession under his guarantee and proceeded with the sale on the 7th of September, 1913. He engaged a Mr. Bass, not "a mysterious Mr. Bass," to take possession of the stock. The keys were turned over to Mr. Main. Mr. Sidder, an agent of Mr. Isaacs, was instructed to engage Mr. Seynei because of his experience and familiarity with Bridge's customers. Mr. Sidder and Mr. Seynei marked the goods for sale. The goods were thereupon sold to the public at retail as an ordinary fire sale is conducted. The receipts of the first few days were up to expectations, then they rather dwindled, and during Isaacs' possession of the store and management of the sale he frequently met Mr. Main and conversed with him concerning the progress of things at the store. A time arrives in fire sales when a retail sale can no longer be conducted, and it is deemed

advisable to put up the entire stock in bulk. This happened here after 19 days of retailing. Mr. Main said to Isaacs: "Use your own judgment; if you sell it in bulk to the merchants here they will steal it; I don't think you will get 30% for the stock." Isaacs then informed him that he had anticipated going in business in the northwest, and that provided he could get a lease on the premises he would put in a bid on the stock himself in the name of some other person, and then if anyone was willing to pay more than his bid they could take the stock. Mr. Main, acting for the complainants, agreed to this, and agreed that he, Isaacs, could put in a bid in his own behalf at a figure which he thought would represent the "fair value of the assets" as they then stood, and then if any other bid came along that was higher than his, they, the other parties bidding, should have it, because that would mean the stock would bring all it was worth. Main thought there was *nothing objectionable in the plan.* Isaacs thereupon advertised and received eight or ten bids. Mr. Main asked him how he would conduct the sale and he stated that he would notify all the merchants in and around Seattle accustomed to buying and dealing in that kind of merchandise. Isaacs notified eight or ten such dealers and the bids ranged all the way from 25% to 30%. The names of the merchants so bidding are given, their financial standing is unquestioned, and there was no charge or claim of collusion between Isaacs and

these bidders. The testimony further shows that the bidders came up to the store before the sale and Mr. Isaacs showed them the original inventory given to him by Mr. Main. He also inserted an advertisement in the "Sunday Times," and on Monday morning he gave to the merchants who came into the store a copy of the inventory taken of the goods, and at the request of the bidders the time of sale was continued for one hour, and there were fifty persons on the premises at the time of the sale, and the bids were opened and read in the presence of all the people on the premises. Isaacs' bid was 45%. It aggregated $11,094. Three or four days before the sale Mr. Isaacs told Mr. Main, the insurance companies' agent (being the only one with whom Mr. Isaacs had negotiated) that he was bidding over 40% or 45% on the dollar. From that time on the insurance companies ceased to have any interest in the premises. The business had then been purchased by Mr. Isaacs from the companies who had purchased it originally from Bridge's assignee, party with Mr. Isaacs' money. From that time on Mr. Isaacs owned the lease on the store and ran it through Mr. Seynei. Seynei was taken in without any investment, but afterwards claimed a partnership, basing his claim on two grounds, one an unsigned agreement and the other the fact that the business was being conducted under his name. (We are not, however, concerned with this controversy here.) The facts which we have given here are testified to in minute detail by David Isaacs

(see Tr. pp. 142 to 157, inc.) and he is corroborated in nearly every detail by the testimony of George C. Main, called by the complainants and by J. R. Mason, likewise called by the complainants.

TESTIMONY OF GEO. C. MAIN, AGENT OF COMPLAINANTS.

Mr. Main testified substantially as follows:

"The maximum that I was willing to allow the insured on account of damage by fire was between $13,000 and $14,000. Bridge, the insured, claimed over $18,000 as his loss. The fire claim was $16,200. I could not agree with the assured as to the loss so I worked down the value of the stock as low as possible for the complainants to take over the stock in bulk at as low a valuation as possible as a speculation, expecting them to realize a substantial gain on it at retail over and above the amount we could have adjusted the loss at *with the assured.* * * * I had a guarantee of $18,100 above expenses from this defendant if the complainants took over the Bridge stock for $34,300, and upon that guarantee I settled with the insured, paying the $34,300 cash and taking the stock. I did not consider there was an opportunity to obtain more than the defendant's guarantee and expenses. I was free to drive a better bargain if I thought I could make one. *In my opinion it was a fair proposition.* I never put it up to anybody else. I hoped there might be a substantial sum beyond Isaacs' guarantee and expenses and so advised the complainants. * * * A salvage man does not always make a profit above his guarantee, and I have known where a deficit was reported. I was disappointed with the small balance paid the complainants by the defend-

ant, and so expressed myself to them. As a matter of fact, this $1049.81 paid the complainants by the defendant amounted practically to only 1/16th part of the loss to them."

(It is to be borne in mind, however, that they were willing to allow the insured between $13,000 and $14,000 without taking over the stock, hence the amount of the insurance companies' loss on the Isaacs' transaction practically amounts to nothing.)

"Isaacs undertook the sale of this stock and sold the merchandise as trustee for the complainants after their purchase of it in bulk for $34,300 cash. The defendant proceeded to sell the entire stock. He made his final report to the complainants through me in the latter part of November, 1913 (Deft. Ex. '2-Q'), with a letter (Complainants' Exhibit 'A'), which report I accepted without an opportunity to verify it, as Mr. Isaacs and his papers were then in San Francisco. After this statement was received, I saw him numerous times, but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale.

I think I was out of town at the time of the sale in bulk and had no knowledge that Isaacs was a bidder and bought the stock. He told me so afterwards. The fact that it was to be sold in bulk was talked over between the defendant and myself before it was advertised. I do not know how long before or when. He said that expenses were beginning to eat up the stock and that he thought it best to sell it under sealed bids and I agreed with him that there would be a loss in conducting the sale any longer. As to his method of disposing of it, it was wholly in his hands. I had nothing to do with it. He could do as he pleased.

I told him, however, if it were put up at sealed bids it could go at a very low figure, that they would steal it from him. He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable.

I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about eleven thousand dollars, which was forty or forty-five per cent of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better.

The inventory of $24,000 I did not make. Isaacs made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so I could not swear positively, but it was about 45% of the original Bridge inventory, which I understood was the purchase price. When Isaacs took the inventory of the stock that was left after the retail sale, that was taken on the same basis as the original Bridge inventory of forty-five or forty-six thousand dollars, as far as I know, and I understood nothing was marked down on account of damage.

I have been an adjuster for twenty-five years and have done a great deal of adjusting for the complainants and am still doing work for them. I concluded that the first inventory had been fairly taken by Bridge at the original cost price, but much of the merchandise was old,

some of the clothing at least twelve or fifteen years old, and many items were not worth anywhere near the original cost price. Ordinarily one day's notice of a sale is not customary and seems to me short, and would tend to cut out competition if the bidders had not been notified in advance. There are several buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise, and ready on short notice to examine a stock, figure on and bid for it. I have heard that Colsky, Buttnick and Westerman & Schermer put in bids. I thought at the time such notice was fair to complainants and sufficient and I have not changed my opinion on that. I went down to the store several times during the progress of the retail sale looking around to see how the sale was going, but did not make any examination of the stock just before the sale in bulk.

At a retail sale the best merchandise sells first.

My stenographer told me that someone from the store came to my office every day with a bundle of sales slips. They might have been added up on my adding machine. I could not say whether, after being added up, they were left with my stenographer. These sales slips were never sent to me as a daily report by the defendant. I never received them as such. My office had nothing whatever to do with them except that the defendant used my adding machine." (Tr. pp. 120 to 123, inc.)

Mr. Main further testified that he thought the inventories were fairly taken, and that while ordinarily one day's notice of a sale is not customary, he thought the notice to bidders "was fair to complainants and sufficient, and *I have not changed*

my opinion on that." (See testimony George C. Main, pp. 118-122.)

Mr. J. R. Mason, the adjuster for Bridge's assignee, likewise called for complainants, testified that he was an adjuster of fire losses, and that he makes a business of examining stocks and merchandise and placing values thereon, and is an expert in estimating the value of merchandise losses. That he was engaged by Bridge's assignee to adjust the loss of the Bridge fire. In speaking of the notice to bidders, he testified that any notice that would be sufficient to assemble a requisite number of responsible buyers in competitive business would be fair, and that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been more extended advertising in the newspapers.

> * * * "Knowing that Isaacs is expert in fire losses, I consider that if he bought the stock at $11,000 he would expect to make a profit, and to that profit you would have to add expenses to arrive at the actual value of that stock. * * * If the balance of the stock sold in bulk was more than half the stock, it could not have all been remnants. Of course the lines are broken. *I consider $11,000 a fair valuation of a stock, the other half of which sold at retail at $17,800.* That is just about the usual percentage of profit of a retail sale, not a fire sale."

This was elicited from Mr. Mason on direct examination of the complainants. Mr. Mason further

testified that he inventoried everything in the store; that is all he knew about.

This last testimony quoted above applies peculiarly to the sale to Isaacs in bulk after he had closed the retail sale. We shall now show by documentary evidence that Isaacs properly accounted for every dollar received by him on behalf of the complainants, and that he made the accounting when under the law and good rules of business he was compelled so to do, and that he is not to be mulcted at this late date because counsel for the complainants has rescued from the ashes of the Bridge fire loss of $16,200 three law suits, one for the sum of $100,000 against Mr. Truax, credit man of the Seattle National Bank; one on the part of Seynei, who had no investment, but sued for some $6000 profits, and this present suit to recover a trust fund of $60,000. The situation is indeed mystifying; how a man can have a fire loss of $16,200, out of which may arise law suits involving $166,000, is beyond comprehension. This large amount is represented by the astute counsel for the complainants. Counsel's share of these tremendous recoveries will, if made, indeed net him a handsome fee, and this may account for his tremendous industry.

ISAACS' STATEMENT OF ACCOUNT.

On November 26, 1913, Mr. Isaacs rendered a statement set out in the complaint as follows:

Defendant's Exhibit "2Q"

"COAST FIRE & MARINE SALVAGE CO.
D. Isaacs, Mgr.
1261 Market Street,
San Francisco.

STATEMENT—SALVAGE OF A. BRIDGE & CO.
Clothing, Furnishings, Shoes.

Net Sales		$28,901.92
Expense:		
Rent	$ 920.00	
Light	66.88	
Advertising	1,204.21	
Clerk Hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28,901.92	5,780.38	
Advanced as guarantee	18,100.00	
	$27,852.11	$27,852.11
Net Proceeds		$ 1,049.81"

Accompanying this was the following letter:

Plaintiff's Exhibit "A"

Letter, November 26, 1913, Isaacs to Main

"Dear Sir:—

I enclose herewith statement of A. Bridge Company, salvage, together with check for $1049.81 to cover the net proceeds.

Trusting you will find same correct and satisfactory, I am,

Yours very respectfully,
COAST FIRE & MARINE SALVAGE CO.
By D. Isaacs."

Mr. Main, to whom the statement was rendered, wrote to his companies on December 8, 1913, the following letter:

Defendant's Exhibit "2T"

Letter, December 18, 1913, Main to Company.

"GEORGE C. MAIN
Adjuster of Fire Losses,
925 Leary Building,
Seattle.

Main 7835 Dec. 18, 1913.

To Companies Interested.

Gentlemen:

LOSS SEATTLE A. BRIDGE & CO.—FIRE AUG. 11, 1913.

I beg to enclose herewith copy of report on sale of salvage rendered by the Coast Fire & Marine Salvage Co. of San Francisco, from which will be seen that the total net recovery is $1049.81.

You will also find enclosed check covering your proportion, the total insurance on stock being $21,000.

I am pleased that we are able to report a substantial salvage, although not quite as much as I had hoped for, but this is easily explained owing to the adverse conditions which confronted Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.

Kindly acknowledge receipt in due course, and oblige,

Yours very truly,
GEO. C. MAIN,
Adjuster."

GCM/M

We particularly call attention to the following language:

"However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory."

Mr. Isaacs testified, and he is absolutely uncontradicted, that after he had purchased the stock in bulk he had many conferences with Mr. Main as to the amount he had paid for it, and on two different occasions went over with Mr. Main the various items included in the statement. (This being the statement set out in full herein, p. 236 Tr.) It was forwarded by Mr. Main to the companies on November 29, 1913. Before entering his final statement on November 29, 1913, Mr. Isaacs figured and informed Mr. Main of the amount of sales and commission on both sales, retail and bulk, at 20%. Mr. Main made no objection to the charge. They also discussed the amount of net proceeds to the complainants and Mr. Main raised no objection to any of the items. Mr. Isaacs further testified that the amount of $28,901.92 represented in full the total amount received by him, both from retail and bulk sales. He explained in great detail on the witness stand how the sale was conducted; he went minutely into the matter of sales and daily realizations and daily expenses and his testimony is absolutely unimpeached as to the material matters involved.

The daughter of the defendant, Mrs. Florence Cohen, testified that she helped her father take cash during the nineteen days; that each clerk was furnished with a sales book which was numbered,

containing 50 blank sheets and a stub index on the back. When a sale was made the amount and character of the goods were written on the slip and put on file. An entry of the amount of the sale was made on the stub and these books each night were left at the desk and on the following day a new book was given the clerk. The next morning there was a check up of the previous day's sales slips to see if the clerks had added their books correctly and to find if they corresponded with the amount of the sales slips. Every day Mr. Bass and the witness took the sales slips to Mr. Main's office, where they were added on Mr. Main's adding machine to get the total sales and the slips were left there. (Tr. p. 160.) At the trial of the case these slips were produced having been first examined by Mr. Herrick, an accountant of unquestioned integrity and ability. Perhaps no accountant stands higher in his profession than Mr. Herrick. He was the auditor in chief of the Panama-Pacific Exposition. Mr. Herrick also examined a cash book produced by the defendant covering sales for 19 days. Mr. Herrick also examined other records produced by the defendant, including his bank book, showing his total deposits. Concerning the slips or daily tags, which of course were made out by the salesmen, he testified:

> "These slips are itemized as to the amount of sales; this cash book is not likewise itemized as to the character of sales, it simply exhibits one entry appearing as total of sales for that day. He pointed out one discrepancy between

> the amounts referred to in the original slips and the cash book kept by the defendant. He testified: 'Taking September 6, 1913, the cash book shows receipts of $3307.95. There is a discrepancy of approximately $10 between the slips and the cash book. The slips bear serial numbers but not one complete series, they bear the numbers appearing in the various books. These sales tags or slips appear, so far as I can determine, to be made in the due and regular course of business, do not bear any evidence or earmarks of changes, obliterations or alterations to any extent that would cause any suspicion." (Tr. p. 132.)

It should be borne in mind that the defendant had nothing whatever to do with the several thousand slips which were produced. (Speaking of the production of these slips his Honor states in his opinion that at the trial the

> "defendant produced several thousand sales slips showing the sales made during this period (19 days), the goods sold and the amount received therefor; the aggregate amount received as shown by these sales slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold as disclosed by the sales slips, we will have approximately the goods shown by the first inventory. The sales slips are not impeached, as practically all of the goods have been accounted for, the claim that a much larger sum was received does not find support in the testimony.")

Speaking further of his entire examination, Mr. Herrick on cross-examination testified:

> "From a standpoint of proper and complete accounting the records shown in the cash book

> are crude, primitive and unsatisfactory. However, the main point is their integrity, and business *continuing indefinitely* could not proceed with such records; taking into consideration that this is what we call a hurry-up proposition, there was no organization of accounts or otherwise. *The entire transaction lasted three weeks. It appears to have been the intent of the defendant to keep an honest record,* and I see nothing indicating the contrary. Practically answering your question, the record is a very abominable accounting."

Mr. Herrick further testified that from his opinion based upon a careful consideration of the papers in evidence, the statement rendered by Mr. Isaacs to the insurance companies was correct. (Tr. p. 135.)

In connection with Mr. Herrick's testimony we particularly call the court's attention to the elaborate statement appearing at pages 238 and 244 of the Transcript, in which a complete and detailed accounting is given.

It might be well to mention here the significant fact that George T. Klink, the accountant, who was called by the complainants, does not question the integrity of the defendant's accounts. There is not the slightest intimation that the statement rendered by Mr. Isaacs was in any wise fraudulent, dishonest or even mistaken. (Testimony of Geo. T. Klink, Tr. pp. 84 to 85.)

The position of Mr. Isaacs is further upheld by the following admission by complainants' witnesses. Slight reference here being, we think, sufficient:

Harry C. Seynei under cross-examination, admits that two or three persons were present for the purpose of bidding and filed papers (he would not call them bids) stating the amount they would pay for the balance of the stock. (Tr. p. 65.)

Testimony of John Jeremy that three or four local merchants were present at the time of the sale of the merchandise in bulk; that Isaacs announced to them that "the time is up; the stock is sold to Harry Seynei," and that he had a few slips of paper in his hand which might have been bids. (Tr. p. 79.)

Testimony of J. R. Mason that forty-five per cent of the value of the stock remaining after a fire sale, is a reasonable price. (Tr. p. 115.) When the cost of operating a return sale reaches a certain point, a sale in bulk becomes advisable; that $11,000 is a fair valuation of a stock, the other half of which sold at retail for $17,800. (Tr. p. 116.)

We think we have set out sufficient facts to have the defendant's position understood.

Argument and Points and Authorities.

Counsel for the complainants has advanced many inconsistent theories, as shown.

THE FIRST AMENDED BILL AND AMENDMENT CONTAINED TWO DISTINCT GROUNDS OF COMPLAINT.

(1) The first amended bill of complaint asks for an accounting on the theory that the sale was

valid. The amended bill filed during the trial for the recovery of the value of a "trust fund" on the ground that the sale was void. The first amended bill of complaint asks for an accounting on the theory that the defendant disposed of the merchandise belonging to the complainants and that he did not "return all of the moneys taken in by him on such sale," and that his "expense items are excessive and his totals are false and untrue." The amendment to this bill filed during the trial charges "that the defendant sold in bulk and secretly to himself without their knowledge and consent, the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the City of Seattle, State of Washington." It will be seen that in the first amended bill the plaintiffs treat the entire sale as valid, the retail sales and the sale in bulk. In the amendment it is sought to separate the two sales and to treat the bulk sale as invalid. The sale in bulk is attacked for the first time on January 31, 1917, through the filing of the amendment. The sale occurred prior to November 26, 1913, when on that date a statement covering the entire transaction was rendered by the defendant to the plaintiffs, and prior to that date it was undisputed that defendant conferred with the agents of the plaintiff concerning said sale.

We do not rely for affirmance of this decree upon technical grounds, but this situation here presented was before the court in *Merriman v. Chicago & E. I. R. Co.*, 64 Fed. 550:

"If the bill is to be treated as a creditors' bill, and as stating a good cause of action to reach and appropriate the bonds in controversy, then we have in the same bill: First, a cause of action to redeem and take from the Eastern Illinois Company all the property obtained by it from the Danville Company; and second, a cause of action to acquire and appropriate bonds by the Eastern Illinois Company to secure and confirm its title to the property so sought to be taken from it. Thus construed, the bill states *two inconsistent causes of action;* and the *right to recover upon one theory is destructive of the right to recover upon the other. Such a bill cannot be maintained.* It would be multifarious and self-contradictory. * * *

If the appellants' case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case *that it has no title,* and also *a case that it has a title,* and then ask for inconsistent relief according to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of these forms of relief would proceed upon a theory fatal to the other form of relief."

In *Union Pacific Co. v. Wyler,* 158 U. S. 285; 39 L. ed. 983, the court, through Mr. Justice White, said:

"While a new cause of action may be introduced by amendment the established limtation on the operation of its relation to the commencement of the suit is, if the amendment

> introduces a new matter or a different cause of action not within the *lis pendens,* as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. Alabama G. S. Co. v. Smith, 81 Ala. 229. * * *
>
> Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed."

In *Whalen v. Gordon,* 95 Fed. 308, the plaintiff's petition was for the recovery of damages for breach of warranty in contract of sale. An amended petition was filed setting forth a rescission of the contract, and seeking to recover the purchase price paid. It was held to state a new and different cause of action, although both causes arose out of the same transaction. In that case the Circuit Court of Appeals said:

> "But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed. * * *
>
> Although these causes of action arose out of the same transaction, the supreme court of Iowa held that the cause stated in the amendment was different from that stated in the original petition, that the amendment did not relate back to the commencement of the action, and that the second cause of action was

> barred by the statute. An extended review of the authorities seems unnecessary, because this court is bound by the decision of the supreme court of the United States, and its opinion in Railway Co. v. Wyler appears to us to end debate. In that case the cause of action in the original petition arose out of the same transaction as did that stated in the amendment,—out of the fact that a fellow servant negligently allowed a heavy iron dump to fall upon the plaintiff."

In the case at bar, the causes of action being different, it necessarily follows that the matters stated in the amended complaint are barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California (contract) and by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California (fraud).

Rogers v. Byers, 1 Cal. App. 286;
Campbell v. Campbell, 133 Cal. 36.

PLAINTIFFS' EXCUSES FOR THEIR APPARENT LACHES, AND TO AVOID THE BAR OF THE STATUTE.

Plaintiffs, in their amendment to the first amended bill, admit that they had knowledge of the sale by the defendant to himself at least on the 13th of February, 1916. Nevertheless, neither their original complaint nor their first amended bill makes any mention nor any claim for relief on that account. It is important to bear this in mind as bearing upon the question of the plaintiffs'

laches and positive acts of acquiescence. The undisputed testimony, however, shows that knowledge of this fact was in the possession of plaintiffs' representative at least on the *26th of November, 1913,* and more than three years prior to the filing of the amendment.

Plaintiffs' excuses for their delay in attacking the transactions are:

(1) That they reside in other states than that of Washington.

(2) That they had no *personal* knowledge of the facts pleaded.

(3) That they believed the representations of defendant.

(4) That the defendant concealed the facts up to the time of the filing of the amended bill.

Let us dispose of these "excuses" in their order, and then inquire whether they are valid excuses under the law.

(1) That They Reside in Other States Than That of Washington.

It is no excuse for delays of the character shown here, that the plaintiffs reside in distant states.

In *Bower v. Stein,* 177 Fed. 678, (9th Circ.) the Court of Appeals said:

> "Unnecessary delay is deemed a waiver of the right. It is no excuse for such delay that the plaintiff is without means or resides in a distant state" (Citing cases).

The plaintiffs had agents resident within the state, and they had an agent for the transaction in question, at the very place it occurred.

(2) That They Had No Personal Knowledge of the Facts Pleaded.

Personal knowledge was not necessary. Plaintiffs' agent and representative had full knowledge. It is undisputed that all the dealings between defendant and the plaintiffs from their very inception to their conclusion were had with their agent and adjuster, George C. Main, and the complaint expressly recognizes this fact and his authority, for it refers to these dealings as being between the plaintiffs and the defendant. No question as to Mr. Main's authority was ever raised in any of the pleadings or in the evidence. He had complete authority to negotiate, receive and conclude, and plaintiffs accepted the benefits and ratified his every act.

In *Shappiro v. Goldberg*, 191 U. S. 241; 48 L. ed. 425, the court said:

> "For this purpose *Richold was the agent of Shappiro,* and, it *not appearing in the proof* that *he was misled by the representations of* Goldberg, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent of

> and nature of the property conveyed and which he undertook to examine for the purchaser.
>
> * * * * * * *
>
> When the means of knowledge are open and at hand, or furnished to the purchaser *or his agent,* and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. (Citing cases.)
>
> * * * * * * *
>
> It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract."

It is a leading principle of law that as between a principal and a third person, that notice to an agent whose duty it is to act upon the information for his principal, or to communicate it to his principal, is notice to his principal. *(10 Cyc.* 1056.) Main had knowledge of all the facts on the 26th of November, 1913, when the bill of complaint alleges that the statement therein contained was "rendered to the complainants."

Mr. Kerr in his valuable treatise of the law of fraud and mistakes, states this rule:

> "Notice to the Agent is Notice to the Principal, for Upon General Principles of Public Policy it Must Be Taken for Granted That the Principal Knows Whatever the Agent Knows."
>
> *Kerr on Fraud and Mistake,* p. 258.

"The Principal or Client is Fixed With the Knowledge of Every Fact Material to the Transaction Which His Agent or Solicitor Either Knows or Has Imparted to Him in the Course of His Employment, and Which it Was His Duty to Communicate, Whether It Be Communicated or Not." (Citing a large number of cases.)

Kerr on Fraud and Mistake, p. 258.

"The Doctrine of Acquiescence Applies Even as Between a Trustee and Cestui Que Trust Even in Cases of Express Trust."

Kerr on Fraud and Mistake, p. 303.

"The Right to Impeach a Transaction on the Ground of Fraud May Be Lost by Inaction, Lapse of Time or Acquiescence."

Kerr on Fraud and Mistake, pp. 301-303.

These rules are recognized in the case of *Hammond v. Hopkins,* 143 U. S. 224; 36 L. ed. 146, a case *involving a purchase by a trustee of trust property.* In that case the court said:

"It will be perceived that the main charge of fraud in fact consists in an alleged conspiracy to obtain the property for less than it was worth. The claims that the sale was fixed at an unpropitious time and that the squares should have been subdivided and sold in lots, go to the adequacy of the price. If there were no such conspiracy, the specific charge falls to the ground, and if all the circumstances relied on to sustain it were actually known *or the appellees were chargeable with such knowledge, then it comes too late.* And if they were fully informed that *the trustees purchased,* and the latter made no false representations in relation to the sale, which mis-

led them, the attempted explanation of the lapse of time as bearing on the purchase by the trustees themselves also fails. * * *

The National Intelligencer was taken at the house, and the advertisement had been read, certainly, by Mrs. Early some time before. George Washington said to a witness, while Chapman was bidding: 'He is buying for Uncle George'; and Isaac H. was 'the first to come in from the sale; and he said that Chapman had bought the property for uncle George W. Hopkins and John, and he said they had paid as much for it as the property was worth.' The subject of the sale, and that George W. and John S. would purchase was frequently talked over as well before as after the sale, and the evidence demonstrates that there was no *secrecy or concealment about it.* * * *

All these complainants saw the brickyard being carried on as before, and George W. and John S. continuing to exercise acts of ownership over the property. They all had no doubt that either of the trustees would have given them any information they desired, and they all evidently had no objection to the trustees becoming the purchasers in and of itself. * * *

The vital question is, Did the appellees actually know, or were they *chargeable with knowledge of,* the fact of the purchase itself? What we have said in effect disposes of the suggestion that by false representations appellees were misled into believing that the sale was fairly conducted when it was not, and that this constitutes a sufficient explanation of the lapse of time."

We call the court's attention particularly to the exhibits referred to on pages 232 to 237 inclusive of the Transcript with reference to the transac-

tion, and it is to be borne in mind that in order that there could be no question as to Main's having communicated to the various companies the details of the transaction, we made the following request:

> "In view of an adjournment and the reappearance of this witness on the stand, I ask that he produce as a part of his examination and cross-examination, the original inventory of Mr. Bridge, referred to in this examination, and proofs of loss filed by Mr. Bridge; and statements and correspondence between Mr. Main and the complaining companies, or whoever represented them at the time, in connection with this loss, and in connection with the arrangement with Mr. Isaacs for the handling of this stock, and in connection with the settlement made by Mr. Isaacs; and all correspondence in the possession of Mr. Main between himself and his principals, in which Mr. Isaacs' transactions occur in connection with the sale and are referred to * * *"

Needlessly we showed at the trial, actual communication by Main of all the facts, or sufficient facts to put plaintiffs on inquiry. There has been complete disclosures made to him by the defendant, and everything that the defendant did was with Main's acquiescence and previous knowledge, and whether or not Main communicated to plaintiffs is immaterial under the law.

If the plaintiffs were not satisfied with the statement to them in 1913, it became their bounden duty to call on their agent for particulars. The statement shows receipts, expenses and commissions. They were put upon notice as to each and

every item. Isaacs reported to the only person in the transaction he knew, their agent, the man with whom the transaction initiated and by whom it was concluded. The plaintiffs accepted the benefits of Main's acts, such as his contract with Isaacs for the $18,100 guarantee. They cannot accept the benefits and repudiate the burdens. The plaintiffs also received from Main Mr. Isaacs' statement of account and retained the same without objection. They also received the amount of his bid of $11,094. They availed themselves, through their agent, of Isaacs' services. They cannot disavow Main's acts whilst accepting and retaining the benefits of them.

Mr. Main's knowledge was plaintiffs' knowledge; his bargains were plaintiffs' bargains; his carelessness, if any, was plaintiffs' carelessness; his laches, if any, were plaintiffs' laches; his means of knowledge were plaintiffs' means of knowledge. Mr. Main was called as a witness by plaintiffs, and they are bound by his testimony. He stands unimpeached. We hasten to quote the following from his testimony, to show that the transactions originated with him:

> "Q. What brought Mr. Isaacs to the scene of this fire? Did he come of his own volition, or was he sent for?
>
> A. I sent for him. I think I either telephoned or telegraphed him." (Tr. pp. 26-27.)

(4) Amendment Seeks to Excuse the Delay in Attacking the Sale in Bulk by the Only Allegation

> "that knowledge of said sale to himself was not communicated to your complainants at any

> time by said defendant and that they only became aware of the same *within ten days prior to the commencement of this action.*" (Amendment p. 1.)

In *Clapp v. Leavens,* 164 Fed. 321, the Circuit Court of Appeals said:

> "It is argued that for that reason the statute did not begin to run until after such discovery. Such an allegation is insufficient. (Citing cases.) The mere ignorance of the plaintiff of his cause of action will not prevent the running of the statute. There must be some *concealment of facts* which ordinary diligence could not discover. In this case none are pleaded."

(The action was commenced February 23, 1916, and this bulk sale transaction was not questioned in the original bill. An amended bill was filed months later, and still the transaction is not attacked. The transaction was questioned for the first time on the 31st of January, 1917, when the amendment was presented, and this was an afterthought brought out by the exigencies of the case.)

Waiving these considerations for the moment, we insist that this allegation does not square up to the requirements of the law that the plaintiffs must show that by the exercise of ordinary diligence the discovery *might not have been sooner made.* Not a particle of evidence was introduced upon this subject. The proof shows, without contradiction, that the agent of plaintiffs had full *knowledge of all the facts as early as November, 1913,* and that as the representative of the plaintiffs he acquiesced in

every detail of the transaction. The amendment does not charge concealment, or any act of fraud on the part of defendant, nor does it show what the discovery was, and that by the exercise of ordinary diligence the *discovery might not have been sooner made.* There is not in the entire record an iota of proof of concealment, or act of fraud upon the part of defendant, and there is absolutely no evidence as to when they discovered that he had "credited himself" with twenty per cent commission. The amendment avoids all mention of this fact, and it is quite obvious that plaintiffs personally knew this fact in November, 1913, and the amendment admits that plaintiffs knew that in February, 1916, defendant had so credited himself with the commission of twenty per cent, and we find acquiescence and no objection or complaint until the very day of the trial of the cause. In speaking of this commission, Isaacs testified:

> "I figured with him the amount of my commissions on both sales, retail and bulk, at 20%. He made no objection to that charge." (Tr. p. 153.)

He is not disputed by Mr. Geo. C. Main, who acted for the complainants, but is indeed corroborated. (Tr. p. 121.)

MAIN WAS MORE THAN A MERE ADJUSTER, AND HIS STATEMENT OF NOVEMBER, 1913, TO THE PLAINTIFFS, CONCLUSIVELY SHOWS THIS FACT.

There is nothing in *Mannheim v. Standard Insurance Co.,* 145 Pac. 992, which militates against our

position. Main was more than a mere adjuster. He was the agent of plaintiffs not only in the matter of adjusting the loss with the assured, but in purchasing the goods and in making the contract for their disposal. He rendered a statement to the company on November 26, 1913, in which his activities are shown, and no objection is made thereto, and his authority to have dealt with defendant concerning these matters remains absolutely unquestioned. The statement speaks of realizations on sales of goods; it mentions expenses. It specifically mentioned "net sales" $28,901.92. It mentions, among other items, commission for handling at 20 per cent on $28,901.92—$5780.38.

Mr. Main positively knew, as shown by the undisputed testimony, that the amount $28,901.92, was made up of the retail sale amounting to some $17,000 and the sale in bulk to Mr. Isaacs, and that he had charged commissions therefor. He made no objection to this item, nor did the plaintiffs make any objection thereto until the trial of this cause, although admitting prior personal knowledge of the fact for at least one year. Main, however, communicated these facts to the plaintiffs at the time of their occurrence. The correspondence which plaintiffs declined to produce would have also shown this fact. But whether he did so or not, is immaterial. They are chargeable with his knowledge. Main's knowledge was plaintiffs' knowledge as of the date he received it.

It was said in *St. Paul Co. v. Pacific Storage Co.*, 157 Fed. 631:

> "The agent of the insurance company knew just where the boats were. He was advised that it was thought best to remove the cargo overland, he knew the probable cost of moving each pound of cargo, and he acquiesced in the opinion that it was best to move it, rather than take the risk of a total loss by the breaking up of the ice in the spring."

In *Stockton Works v. Glenn Insurance Co.*, 121 Cal. 180, the court said:

> "I think the evidence shows quite clearly that Dogrman was acting for all the companies, at least in the adjustment of the loss after the fire. He was the local agent for several of the companies at Stockton, and to him was presented the proofs of loss by plaintiff, as agent of all the companies; his name is among those of the adjusters signed to their report; his name is attached to the agreement for the submission to arbitration, in which, with others, he assumes to represent all the companies."

It is quite apparent that Main's authority was not limited merely to "ascertain and report the actual loss or damage by fire."

EXHIBITS "C" AND "19" REFERRED TO ON PAGES 8 AND 172 OF APPELLANTS' BRIEF, ARE MISLEADING.

These figures were entered as Bridge's inventory figures, and were entirely based on that inventory, with which Isaacs had nothing to do. The fact, however, is immaterial, as the goods had already

been purchased by the defendant with the knowledge and consent of plaintiffs' agent. They were his goods to do with as he pleased. If he paid $11,094 for the goods, and expected to retail them, he would have to add to this cost 25 per cent for overhead expenses (the testimony shows this to be the usual expense allowed), interest on the money and reasonable profits. The testimony shows that many of the articles were sold *below* Bridge's inventory price. The testimony also conclusively shows that Isaacs paid a fair price for the goods, and that it was the highest price obtainable.

The plaintiffs' case completely failed in their attacks on the inadequacy of the price paid. This is shown not only by the testimony of Main, but by that of George Mason, plaintiffs' own witness—a disinterested witness:

> "I consider $11,000 a fair valuation of a stock, the other half of which sold at retail for $17,800. This is just about the usual percentage of profit at a retail sale—not a fire sale." (Tr. p. 116.)

The testimony is exceedingly significant, as it shows the fallacy of counsel's theory on the inventory angle of the case and fairly demonstrates the fairness of the transaction on the part of the defendant.

The witness, J. O. Johnson, called by plaintiffs, testified as follows:

> "To the best of my knowledge the goods were sold according to the sale prices on them for the fire sale. There was no stock sold at whole-

sale that I know of. To the best of my knowledge, it was all sold piece by piece over the counter at retail. The insurance sale apparently held up well during the three weeks and in my opinion was a successful sale.

I was employed by H. C. Seynei & Co. during the sale of the balance of the Bridge stock. As I remember the same prices were left on the goods. I was paid in cash, eighteen dollars a week." (Tr. p. 88.)

What is there left of counsel's case? Seynei and Jeremy.

It is a leading principle of law that when a contract is made by one assuming to act in behalf of corporations, and the corporations receive and retain the benefits of such act without objection, they thereby ratify the unauthorized act and estop themselves from repudiating it. In other words, the corporation cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; it cannot keep the advantages while repudiating the burden; it cannot disaffirm the contract while keeping the consideration. (*10 Cyc.* 1078.)

When the plaintiffs received Main's statement, they did not question his right to do any of the things therein referred to.

It is also a leading principle of law that as between a principal and a third person, that notice to an agent whose duty it is to act upon the information for his principal, or to communicate it to his principal, is notice to this principal. (*10 Cyc.* 1056.)

Main had knowledge of all the facts on the 26th of November, 1913, when the bill of complaint alleges that the statement therein contained was "rendered to the complainants".

ISAACS' STATEMENT TO MAIN OF NOVEMBER 26, 1913, WAS ACCOMPANIED BY A LETTER CONCLUDING WITH THE SENTENCE, "TRUSTING YOU WILL FIND THE SAME CORRECT AND SATISFACTORY", ETC.

This letter was received by Main on the same date and the statement was transmitted by Main to the complaining companies on December 18, 1913. Main in his letter to the companies states that the amount recovered is "net gain over what we were able to close the loss with the insured through their adjuster, Mr. Mason, and on the whole satisfactory". Not the slightest objection was made to that account until the complaint in this case was filed on the 10th day of May, 1916, and the complaint does not point out wherein the account was defective, the charge being made only that the expense items are excessive and the totals false and untrue. At the trial of the case Mr. Isaacs took up every single expense item, the rent, the lights, the advertising, clerk hire, materials, insurance, commission, advance guarantee, etc., and did it so thoroughly that counsel has been compelled to abandon the claim that the expense items were excessive. It was shown at the trial that all the dealings between the defendant and the plaintiffs from the very inception to their con-

clusion were had with their agent or adjuster, Mr. George C. Main. His authority to negotiate and receive and conclude was expressly recognized; not one word of complaint on the part of Mr. George C. Main has ever been uttered. He who was thoroughly familiar with the details of the transaction has verbally and in writing testified to their integrity. Mr. Main was advised of the sale in bulk to Mr. Isaacs. Isaacs' method of accounting was the same as had been used in previous cases. Shortness of notice to bidders was not exceptional or detrimental. Mr. Main considered the entire transaction fair, and has not changed his opinion. The plaintiffs received the statement rendered by Isaacs and retained it without change or objection; they retained the guarantee of $18,100; they have retained the check for $1049.81; they retained the benefit of defendant's services. If they ever had a remedy for their imaginary wrongs they failed to exercise it within the time allowed by law. Mr. Main knew the facts, he knew of the retail sale, he knew of the sale in bulk, he knew of the commission charged, his reports were accepted, his principals have remained idle and accepted the benefits and have not rescinded or at any time offered to rescind the transaction.

As the distinguished judge who tried this case points out, the claim against the defendant seems to be three fold, first, that his expense account is excessive; second, that he did not account for moneys received during the fire sale, and third, the

claim arising out of and by reason of the sale in bulk to Seynei himself. Speaking of these three claims, the court states *"the only testimony offered to impeach the expense account was the mere opinion of the witness Seynei that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established"*. Mr. Seynei was the chief witness for the complainants. Seynei was taken in by Isaacs after he had purchased the goods in bulk from the insurance companies. Seynei conducted the business for Isaacs after he had purchased the same from the insurance companies, and this same Seynei is the plaintiff in the suit of *Seynei v. Isaacs.* We are not familiar with this case, as we did not participate in the trial. This record only incidentally refers to that suit. It is not involved here at all in any way. Counsel invokes that decision in lieu of his proof in this case, just as he might invoke a decision in the Seattle $100,000 suit if he should be successful there. We shall make no reference to the Seynei suit, the manner in which it was tried, or the reasons for the decision, as it has no place here. The defendant of course takes the ground that he was unjustly found against; that however, is a matter of no moment. We submit that he has accounted for every dollar taken on the retail sale, his expenses as well as his receipts, and there is not a particle of testimony to the contrary. We also submit that the sale in bulk to him was had with the approval of the complainants' agent, and they are estopped from complaining. We also contend that the evidence of the com-

plainants, itself conclusively establishes—that the amount paid by Isaacs $11,000 for the goods in bulk, at the close of the retail sale, was a fair price. (See testimony of Mason, page 116; see testimony of Main, page 121). Main stating "I think it was a very good bid." That there was no clandestine appropriation of merchandise as claimed, and we further assert that the whole case is broken down through lack of proof; that Mr. Isaacs has fully, freely and honestly accounted in open court. He has dealt frankly with the court in every particular. If he was not able to more technically account then he is not to blame, for the transaction occurred way back in 1913, and his accounting rendered at the time was accepted, and he is not to blame for the lapse of time in sueing. Plaintiffs' own laches prevent them from demanding things which cannot be produced. He accounted once and no objection was made thereto for three years.

In *Eichel v. Sawyer,* 44 Fed. 853, (involving commissions of factors) the court said:

> "But whether they acknowledged the correctness of these accounts or not, when they received those accounts and did not in a reasonable time thereafter point out errors or deny their correctness, the law treats their silence as an admission of their correctness."

And, as is said in *Porter v. Price,* 80 Fed. 656 (factor):

> "But a man cannot be allowed to lay a rendered account aside, and afterwards merely upon saying that he did so trusting to the honesty

> and accuracy of the other party, be allowed to attack it in respect to matters apparent upon reasonable examination of the items as stated on the face of the account."

In *Allen West Commission Co. v. Patillo,* 90 Fed. 629 (factor's commissions), the court said:

> "A party charged may undoubtedly show errors and omissions apparent in the account, but the burden of showing them *is upon him who receives and keeps the account without objection.* The errors in the account must be specified. They will not be corrected on doubtful testimony. They must be made to clearly appear."

The defendant has established, clearly and satisfactorily these three propositions:

1. That his expense account was not excessive, he accounted indeed for every item charged as an expense;

2. That he has accounted for every dollar of the moneys received during the retail sale by the production of his original sales slips taken during the 19 retail sales days—sales slips turned in by the salesmen (some 40 or 50 in number) and by the production of his cash book and his bank book.

3. That he has accounted for the fairness of the sale in bulk to himself by the payment of $11,000 to the complainants—by showing that such sale was had with the full knowledge, consent and approval of complainants' agent, George C. Main and was made only after defendant had received bids from other bidders, his being the highest. In a word,—he has accounted for this transaction by proving

that the plan was submitted to Mr. Main himself and was agreed on by him and further that the complainants received the benefits of the transaction with full knowledge of the facts.

His honor, Judge Rudkin, has thoroughly reviewed the facts and the law in his opinion, which we have made part of this brief.

In conclusion, we respectfully submit that there are not even suspicious circumstances against the defendant, and suspicious circumstances no matter how numerous are not sufficient on which to predicate a decree of fraud. (*Harvey v. Stowe,* 219 Federal Reporter, page 17.) The case here rests solely upon the unwarranted insinuations and gross exaggerations found throughout the 235 page brief filed by the counsel for the appellants.

Dated, San Francisco,
March 8, 1918.

Respectfully submitted,

BERT SCHLESINGER,
LEON E. PRESCOTT,
Attorneys for Appellee.

(APPENDIX FOLLOWS.)

Appendix.

We have annexed to this brief the opinion of Judge Rudkin and a tabulated statement based on facts and figures, which remain undisputed, and based principally upon the testimony of Mason and Main, witnesses for the plaintiffs.

This tabulation clearly demonstrates why Mr. Main wrote to the plaintiffs as follows:

> "* * * However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory."
>
> Defendant's Exhibit "2 T", Tr. p. 237.

The tabulation appearing in the Appendix to the brief of appellants is dated September 25, 1917, seven months after the trial of this case.

OPINION OF JUDGE RUDKIN.

"This is a suit in equity for an accounting.

On the 11th day of August, 1913, the plaintiffs were insurers in varying amounts aggregating $21,000 in all, on a stock of merchandise in the City of Seattle owned by one Bridge, doing business under the name of A. Bridge & Co. On that date a fire occurred in the store building occupied by Bridge, causing a loss, the extent of which is a matter of dispute between the parties to the present controversy.

Soon after the loss occurred, Bridge made an assignment to one Truax, a representative of the Seattle National Bank, for the benefit of his creditors, and negotiations were entered upon for the adjustment of the loss. In the course of these negotiations the plaintiffs were represented by one Main, and the assured and his assignee by one Mason, as insurance adjusters. The adjuster representing the assured and the assignee claimed a loss of $18,254.84 which was later reduced to $17,000, and finally to $16,200. The adjuster representing the plaintiffs conceded a loss of $13,588.65, but refused to concede more. Being thus unable to agree upon the amount or extent of the loss, it was finally agreed between the assignee and the plaintiffs, that the sound value of the stock before the fire was $34,300, and that the plaintiffs would take over the stock at that figure. At the same time, and as a part of the same transaction, it was agreed between Main and the defendant, that the

defendant would put up a guarantee of $18,100 and sell the stock for the benefit of the plaintiffs, receiving for his services in that behalf a commission of twenty per cent on the gross amount realized on the sale. Pursuant to this arrangement, the defendant paid the guarantee of $18,100 and the plaintiffs paid $16,200, thus making up the sound value of $34,300, and insuring the plaintiffs against any loss in excess of the $16,200 claimed by the insured and his assignee.

Thereafter a fire sale was conducted by the defendant at the old Bridge stand for a period of nineteen days, exclusive of Sundays. The gross proceeds of this sale, as reported by the defendant, was approximately $18,000. At the expiration of this nineteen-day period, the remainder of the stock was sold in bulk at private sale on sealed bids, ostensibly to one Seynei, but in reality to Seynei and the defendant, who had formed a co-partnership for the purpose of taking over the stock. The amount realized on this sale in bulk was approximately $11,000.

After the latter sale, the fire sale was continued at the same stand by the defendant and Seynei for a period of about seven weeks, some new stock being added in the meantime.

On the 26th day of November, 1913, the defendant rendered the following statement to Main:

"Statement—Salvage of A. Bridge & Co.

Clothing, furniture, shoes, net sales		$28,901.92
Expenses.		
Rent	920.00	
Light	66.88	
Advertising	1,204.21	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28,901.92	5,780.38	
Advanced as guarantee	18,100.00	27,852.11
		$ 1,049.81"

and inclosed the same together with a check in the following letter:

> "I inclose herewith a statement of A. Bridge & Co. salvage, together with check for $1049.81, to cover the net proceeds.
>
> Trusting you will find the same correct and satisfactory."

On December 8, 1913, Main wrote to the plaintiffs, inclosing a copy of the report and stating:

> "You will also find enclosed check covering this proportion. The total insurance on stock board was $21,000. I am pleased that we are able to report a substantial salvage, although that is not as much as we had hoped for, but this is explained owing to the adverse conditions confronting Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through his adjuster, Mr. Mason, and on the whole, satisfactory."

This money was retained by the plaintiffs, and nothing more was heard of the transaction until shortly before the institution of the present suit.

In the meantime, Seynei and the defendant became involved in litigation over their partnership affairs, and from certain disclosures made on the trial of that case, the plaintiffs concluded that they had been defrauded by the defendant, and demanded a further accounting. Such demand was not complied with, and the present suit followed.

Before discussing the facts, two preliminary questions of law should be disposed of. The plaintiffs contend, first, that Main as a mere insurance adjuster had no authority to represent or bind them; and second, that the burden is upon the defendant to render a full, true and correct account of his stewardship.

In support of the first proposition, my attention is directed to a provision of the Insurance Code of the State of Washington, defining the term "adjuster" or "insurance adjuster", and to a decision of the Supreme Court of the State, construing that statute. I find no fault with that decision. Of course, a mere adjuster has no authority, express or implied, to bind his principal. Like the ordinary claim agent, he can only investigate and report. But what are the facts here? Main employed the defendant, agreed upon his commission, agreed with the assignee of the insured to take over the stock of goods for $34,300, consulted with the defendant as to the time and manner of sale, including the sale in bulk, and transmitted to the plaintiffs the statement of account

received from the defendant. Manifestly he did not do any or all of these things as a mere adjuster, and yet his authority in that regard has never been questioned, and is not now questioned by the plaintiffs. Like any other agent, the authority of an adjuster lies in contract and he has such authority as the principal expressly confers, and such as the principal knowingly permits him to exercise without protest or objection. Within this rule, it seems to me there can be no question, but that the acts of Main were the acts of the plaintiffs themselves, and that his knowledge was their knowledge. If such is not the case, the plaintiffs were not represented at all, for admittedly they had no dealings with the defendant, except through Main.

The second proposition advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.

Eichel v. Sawyer, 44 Fed. 853;
Porter v. Price, 80 Fed. 656;
Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150;
Allen West Commission Co. v. Patello, 90 Fed. 629.

Now, what are the facts? The claim made by these plaintiffs is somewhat extravagant, to say

the least. Their printed brief opens with the statement:

> "This is a case in equity, against the trustee by his *cestui que trust* for an accounting of a sixty thousand dollar trust fund in his hands, consisting of merchandise which has all been sold and disposed of by the trustee."

The unusual claim on the part of the plaintiffs that they profited upwards of $25,000 by this fire finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of $100,000 for sacrificing his property. Seynei, according to his testimony, conspired with the defendant to defraud the plaintiffs, and later quarreled with his partner in iniquity over the spoils. Jeremy assisted in the preparation of the false, fictitious inventory to the same end.

These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added twenty-five per cent to the value of the stock. Such claim and such testimony do not appeal to me very strongly. The fact is not disputed that the assignee, for the benefit of the creditors, claimed a loss in the sum of $16,200, and refused to accept an offer of upwards of $13,000. The fact is not disputed that he was willing to accept $34,300, as the sound value of the goods before the fire, which would, of course, include the value of the damaged stock and the claims against the plaintiffs. In his estimation,

therefore, the value of the damaged stock was about $18,000, and other parties concerned did not differ widely upon that question.

The claim against the defendant is threefold. First, that his expense account is excessive; second, that he has not accounted for moneys received during the first sale; and third, the claim arising out of and by reason of the sale in bulk to Seynei and himself. The only testimony offered to impeach the expense account was the mere opinion of the witness, Seynei, that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established. The claim that moneys received by the defendant during the fire sale have not been accounted for is sought to be established in this way: An inventory of the stock was taken immediately after the fire, showing the value to be approximately $45,000 at cost price. A second inventory was taken at the close of the fire sale, showing the cost price of the balance of the stock to be approximately $24,000. The first of these inventories was assumed to be correct without proof by all parties at the trial, and I do not understand that the correctness of the second inventory is impugned, aside from the claim that the cost price of some of the goods was marked down. A comparison of these two inventories shows, therefore, that the cost price of the goods sold during the nineteen days of the fire sale, was approximately $20,000. Testimony was offered tending to show that these goods were sold at a considerable profit, probably twenty-five or

thirty-five per cent above the cost price. If such were the case, it would seem clear that the sum realized during this period should be several thousand dollars in excess of the $18,000 reported by the defendant. As against this, the defendant produced at the trial several thousand sales slips, showing the sales made during this period, the goods sold, and the amount received therefor. The aggregate amount received as shown by these sales slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold, as disclosed by the sales slips, we will have approximately the goods shown by the first inventory. The sales slips are not impeached and inasmuch as practically all of the goods have been accounted for, the claim that a much larger sum was received does not seem to find support in the testimony. The plaintiffs, therefore, have failed to show that the account as rendered by the defendant is incorrect up to the time of the sale in bulk.

It will readily be conceded, of course, that a sale by an agent to himself is voidable at the option of the principal, but it must likewise be conceded that he can sell to himself with the consent of his principal just as readily as the principal can sell to him. The fact is clearly established in this case, that the matter of this sale to the defendant was discussed before the sale, and was known to Main, and the latter testified upon the trial that he deemed the offer a fair one at that time, and was of the same opinion still. It

would seem idle therefore for the plaintiffs to claim that they can now set this sale aside after the lapse of more than three years. The utmost they can claim would be to call upon the defendant to account for the amount of his bid, namely, forty-five per cent of the cost price. There is some testimony before the court tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid; but for the reasons already stated, I am not prepared to say that fact has been established.

It seems to have been understood between the parties that the defendant was to have his commission on that sale as well as upon the others; and if the bid was put in to prevent a sacrifice, there would seem to be no injustice in allowing the commission. In any event, the fact that the commission was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by reason thereof.

After a full examination of the accounts, a competent expert for the defendant testified that he was unable to find any evidence of dishonesty. He candidly admitted, however, that the business methods of the defendant were crude, and his accounts abominable, and in that conclusion I fully agree. The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake.

The plaintiffs declare that this suit involves not merely the amount claimed, but the more important question, Are they at the mercy of their adjusters and salvers? I can only say in answer to this that the business of every corporation is transacted through agents, and its success will depend upon the fidelity of these agents and a proper supervision of the corporate affairs. And if these plaintiffs pursue in the future the course they have pursued in the past, the salvage end of their business will probably prove disastrous.

On the entire record I can find no basis upon which a decree can be given in favor of the plaintiffs for any item or any sum, and the bill is accordingly dismissed."

Gross realization sale of goods at retail		$17,915.87
Gross realization sale of goods at wholesale		11,094.00
TOTAL GROSS REALIZATION		29,009.87
Mason's claim of sound value	$38,675.00	
Mason's *first* claim of loss	18,254.84	
Sound value of stock after fire	20,420.16	
Gross realization (as above)	29,009.87	
42%—Excess of realization over sound value		$ 8,589.71
Mason's claim of sound value	$38,675.00	
Mason's *second* claim of loss	17,000.00	
Sound value of stock after fire	21,675.00	
Gross realization (as above)	29,009.87	
33.8%—Excess of realization over sound value		$ 7,334.87

Mason's claim of sound value	$38,675.00
Mason's *third* claim of loss	16,200.00
Sound value of stock after fire	22,475.00
Gross realization (as above)	29,009.87
29.2%—Excess of realization over sound value	$ 6,534.87
Main's claim of sound value (1st)	$35,393.40
Main's claim of loss	13,588.65
Sound value after fire	21,804.75
Gross realization (as above)	29,009.87
33%—Excess of realization over sound value	$ 7,205.12
Main's claim of sound value (2d)	$34,300.00
Main's claim of loss	13,588.65
Sound value after fire	20,711.35
Gross realization (as above)	29,009.87
40%—Excess of realization over sound value	$ 8,298.52

Expense of Sale	$3,971.56
20% on $29,009.87	5,801.97
	$9,773.53

Sound Value.	$18,100.00
Realization	29,009.87
60%—Excess of realization	10,909.87
Expenses	9,773.53
	$ 1,136.34